

No. 14410

In the
United States Court of Appeals
For the Ninth Circuit

ERWIN P. WERNER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Appellant's Opening Brief

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FILED

NOV 19 1954

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TOPICAL INDEX

	Page
Jurisdiction	1
Statutes and Proclamations Involved.....	1
Proclamation 2487	1
The Joint Resolution of July 25th, 1947 of Con- gress	4
Title 50, Section 171, U. S. Code, Section 3.....	5
Proclamation of the President of April 28, 1952.....	6
Questions Raised by This Appeal.....	9
Statement of Facts.....	9
Summary of Argument.....	11
Specifications of Errors.....	12
I. The District Court Erred in Holding That the National Emergency was Not Termi- nated as of July 25, 1947, and That the Joint Resolution of Congress of July 25, 1947 Did Not Have That Effect.....	12
II. The District Court Erred in Holding That a National Emergency Proclaimed by the President May Not Be Terminated by a Joint Resolution of Congress.....	12
III. The District Court Erred in Not Allowing the Plaintiff Rent From the Date of His Acquisition of the Property, Based Upon the Reasonable Value of the Land, Which the Government Continued to Use After	

	Page
the Termination of the Unlimited National Emergency for the Government Airbase.....	12
Argument	13
I. The District Court Erred in Holding That the National Emergency was Not Termi- nated as of July 25, 1947, and That the Joint Resolution of Congress of July 25, 1947 Did Not Have That Effect.....	13
II. The District Court Erred in Holding That a National Emergency Proclaimed by the President May Not Be Terminated by a Joint Resolution of Congress.....	20
Conclusion	23

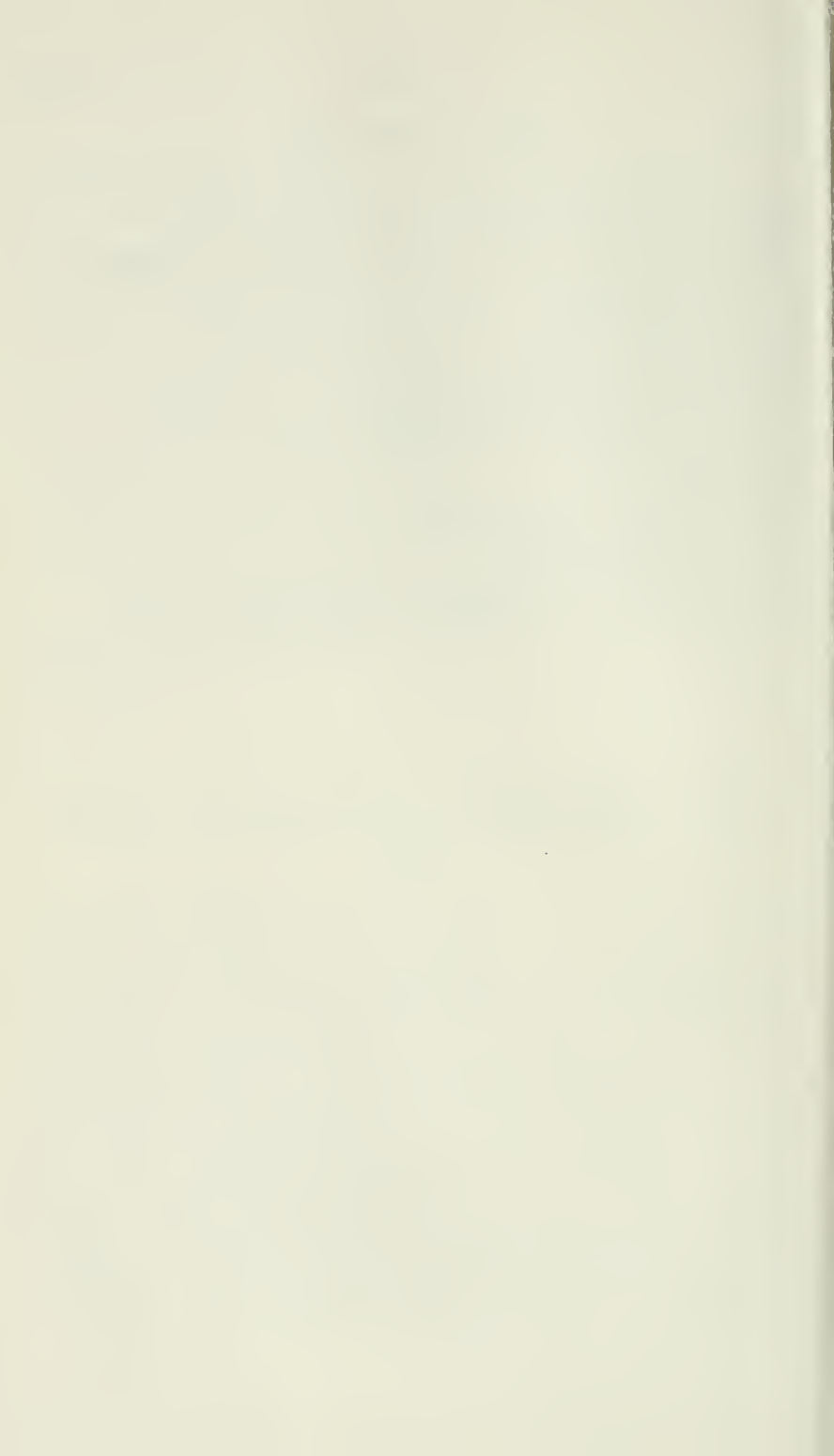
TABLE OF CASES AND AUTHORITIES CITED

Cases

Barrett v. Hitchcock, 241 Mo. 433.....	17
Carter v. Territory, 1 N. M. 317.....	17
Hamilton v. Kentucky Distilleries, 251 U. S. 153.....	22
Knauff v. Shaughnessy, 338 U. S. 537.....	18
Kurt G. Luecke v. Walkins, 335 U. S. 160.....	17
Lapayre v. United States, 84 U. S. 191, 195.....	16
Machin v. State, 62 Md. 244.....	17
Muir v. Louisville & N. H. Co., 247 Fed. 888.....	15
Simon v. Moore, 261 Fed. 638.....	17
Werner v. United States, 198 Fed. (2d) 882.....	10
Wood v. Beach, 156 U. S. 548.....	16-17

Codes, Statutes, etc.

	Page
Bouviere's Law Dictionary.....	16
Constitution of United States, Article I, Sections 1 to 18 incl.....	19
Proclamation 2487	1, 15
Proclamation 2974	6
U. S. Code, Title 28, Section 1291.....	1
U. S. Code, Title 50, Section 171, Sec. 3.....	5
War Brides Act.....	18, 19
65 C. J. page 1271, Sec. 32b.....	14
72 C. J. S. page 1205.....	14
80th Congress 1st Session, Ch. 327—July 25, 1947	4, 9, 11, 12, 13, 15, 19, 23



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*To the Honorable Judges of the United States Court
of Appeals for the Ninth Circuit:*

JURISDICTION

Jurisdiction is conferred by Title 28, Section 1291,
U. S. Codes.

The decision of the District Court of the United
States was rendered March 16, 1954 (R. 48). Notice
of Appeal was filed April 9, 1954. (R. 50).

STATUTES AND PROCLAMATIONS INVOLVED
Proclamation 2487

Proclamation 2487 provides as follows: "Presi-
dential Proclamation 2487 of May 21, 1941, 6 F. R.

2617, 55 Stat. 1647, 50 App. U. S. C. Note prec. sec. 1, p. 5636, is as follows:

Proclaiming That an Unlimited National Emergency Confronts This Country, Which Requires That Its Military, Naval, Air and Civilian Defenses Be Put on the Basis of Readiness to Repel Any and All Acts or Threats of Aggression Directed Toward Any Part of the Western Hemisphere

By the President of the United States of America
A Proclamation

Whereas on September 8, 1939, because of the outbreak of war in Europe a proclamation was issued declaring a limited national emergency and directing measures 'for the purpose of strengthening our national defense within the limits of peacetime authorizations.'

Whereas a succession of events makes plain that the objectives of the Axis belligerents in such war are not confined to those avowed at its commencement, but include overthrow throughout the world of existing democratic order, and a worldwide domination of peoples and economies through the destruction of all resistance on land and sea and in the air, and

Whereas indifference on the part of the United States to the increasing menace would be perilous and common prudence requires that for the security of this nation and of this hemisphere we should pass from peacetime authorizations of military strength to such a basis as will enable us to cope instantly and decisively with any attempt at hostile encirclement of this hemisphere, or the establishment of any base for aggression against it, as

well as to repel the threat of [18] predatory incursion by foreign agents into our territory and society,

Now, Therefore, I, Franklin D. Roosevelt, President of the United States of America, do proclaim that an unlimited national emergency confronts this country, which requires that its military, naval, air and civilian defenses be put on the basis of readiness to repel any and all acts or threats of aggression directed toward any part of the Western Hemisphere.

I call upon all the loyal citizens engaged in production for defense to give precedence to the needs of the nation to the end that a system of government that makes private enterprise possible may survive.

I call upon all our loyal workmen as well as employers to merge their lesser differences in the larger effort to insure the survival of the only kind of government which recognizes the rights of labor or capital.

I call upon loyal state and local leaders and officials to cooperate with the civilian defense agencies of the United States to assure our internal security against foreign directed subversion and to put every community in order for maximum productive effort and minimum of waste and unnecessary frictions.

I call upon all loyal citizens to place the nation's needs first in mind and in action to the end that we may mobilize and have ready for instant defensive use all of the physical powers, all of the moral strength and all of the material resources of this nation.

In Witness Whereof I have hereunto set my hand and caused the seal of the United States of America to be affixed.

Done at the City of Washington this twenty-seventh day of May, in the year of our Lord nineteen hundred and forty-one, and of the Independence of the United States of America the one-hundred and sixty-fifth.

(Seal) FRANKLIN D. ROOSEVELT."

(R. 23-25, Exhibit C)

The Joint Resolution of July 25th, 1947 of Congress

The Joint Resolution of July 25th, 1947 of Congress provides as follows:

80th Congress, 1st Session, Ch. 327—July 25, 1947.

JOINT RESOLUTION

To Terminate Certain Emergency and War Powers.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, that the following statutory provisions are hereby repealed:

* * *

Sec. 3. In the interpretation of the following provisions, the date when this joint resolution becomes effective shall be deemed to be the date of the termination of any state of war heretofore declared by the Congress and of the national emergencies proclaimed by the President on September 8, 1939, and May 27, 1941.

Title 50, Section 171, U. S. Code, Section 3

Title 50, Section 171, U. S. Code, Section 3, provides as follows:

171. Acquisition of lands; authority of Secretary of the Army; condemnation, purchase, and donation; emergency provisions.

The Secretary of Army may cause proceedings to be instituted in the name of the United States in any court having jurisdiction of such proceedings for the acquirement by condemnation of any land, temporary use thereof or other interest therein, or right pertaining thereto, needed for the site, location, construction, or prosecution of works for fortifications, coast defenses, military training camps, and for the construction and operation of plants for the production of nitrate and other compounds and the manufacture of explosives and other munitions of war and for the development and transmission of power for the operation of such plants. Such proceedings to be prosecuted in accordance with the laws relating to suits for the condemnation of property of the States wherein the proceedings may be instituted:

Provided, that when the owner of such land interest or rights pertaining thereto shall fix a price for the same which in the opinion of the Secretary of the Army shall be reasonable, he may purchase or enter into a contract for the use of the same at such price without further delay;

Provided, further, that the Secretary of the Army is authorized to accept on behalf of the United States donations of land and the interest

and rights pertaining thereto required for the above mentioned purposes;

And provided, further, that when such property is acquired in time of war, or the imminence thereof, upon the filing of the petition for the condemnation of any land, temporary use thereof, or other interest therein, right pertaining thereto be acquired for any of the purposes aforesaid, immediate possession thereof may be taken to the extent of the interest to be acquired and the lands may be occupied and used for military purposes. (Aug. 18, 1890, ch. 797; 26 Stat. 316; July 2, 1917, ch. 35, 40 Stat. 241; April 1, 1918, Ch. 54, 40 Stat. 518, July 26, 1947, ch. 343, Title II; par. 205 (a), 61 Stat. 501.)

Proclamation of the President of April 28, 1952

The Proclamation of the President of April 28, 1952 provides as follows:

TITLE 3 — THE PRESIDENT PROCLAMATION 2974

TERMINATION OF THE NATIONAL EMERGENCY PROCLAIMED ON SEPTEMBER 8, 1939 and MAY 27, 1941

By the President of the United States of America

A Proclamation

WHEREAS by Proclamation No. 2352 of September 8, 1939, the President proclaimed the existence of a national emergency in connection with and to the extent necessary for the proper observance, safeguarding, and enforcing of the neutral-

ity of the United States of America and the strengthening of our national defense within the limits of peace-time authorizations; and

WHEREAS by Proclamation No. 2487 of May 27, 1941, the President proclaimed the existence of an unlimited national emergency, requiring that the military, naval, air and civilian defenses of this country be put on the basis of readiness to repel any and all acts or threat of aggression directed toward any part of the Western Hemisphere; and

WHEREAS acts of aggression against the United States of America by Axis Powers subsequently led to declarations by the Congress of the existence of states of war between the United States of America and Japan, Germany, Italy, Hungary, Rumania and Bulgaria; and

WHEREAS the state of war between the United States of America and Japan, which was the last of the aforesaid states of war still existing, was terminated by the coming into force this day of the Treaty of Peace with Japan signed at San Francisco on September 8, 1951;

NOW THEREFORE, I, HARRY S. TRUMAN, President of the United States of America, do proclaim that the national emergencies declared to exist by the proclamations of September 8, 1939, and May 27, 1941, terminated this day upon the entry into force of the Treaty of Peace with Japan.

Nothing in this Proclamation shall be construed to affect Proclamation No. 2914, issued by the President on December 16, 1950, declaring

that world conquest by communist imperialism is the goal of the forces of aggression that have been loosed upon the world, and proclaiming the existence of a national emergency requiring that the military, naval, air and civilian defenses of this country be strengthened as speedily as possible to the end that we may be able to repel any and all threats against our national security and to fulfill our responsibilities in the efforts being made through the United Nations and otherwise to bring about lasting peace; and nothing herein shall be construed to affect the continuation of the said emergency of September 8, 1939, as specified in the Emergency Powers Interim Continuation Act, approved April 14, 1952 (Public Law 313—82d Congress), for the purpose of continuing the use of property held under the Act of October 14, 1940, ch. 862, 54 Stat. 1125, as amended,

IN WITNESS WHEREOF, I have hereunto set my hand and caused the Seal of the United States of America to be affixed.

DONE at the City of Washington this twenty-eighth day of April in the year of our Lord nineteen hundred and fifty-two, and of the Independence of the United States of America the one hundred and seventy-sixth.

HARRY S. TRUMAN

By the President:

Dean Acheson,

Secretary of State.

QUESTIONS RAISED BY THIS APPEAL

(1) Whether the Joint Resolution of Congress of July 25, 1947, Public Law 239, terminated the National Emergency as proclaimed by the President on September 8, 1939 and continued on May 27, 1941.

(2) Whether the plaintiff, by reason thereof, is entitled to rent from the date of the termination of the national emergency as declared by the Act of Congress, on land which he and his wife owned in Riverside County, California, and for which there was a lease which extended only six months beyond the unlimited national emergency as declared by the President in his proclamation of May 27, 1941—Proclamation 2487.

(3) Whether the lease contract of plaintiff expired July 25, 1947 and plaintiff is therefore entitled to recover for use of land from six months thereafter.

STATEMENT OF FACTS

The plaintiff in this action owned 40 acres of land near March Field Airbase at Riverside County, California. The property had originally been owned by Mark L. Herron and Barbara Herron, his wife, who, entered into a lease with the United States of America for the land upon the payment of \$25.00 per year rental and provided that occupancy at this rate could not be extended beyond six months from the date of the termination of the unlimited national emergency as declared by the President of the United States on May 27, 1941.

On May 17th, 1948, Mr. and Mrs. Herron deeded the property covered by the lease to the plaintiff. Subsequent to his acquisition, plaintiff filed an action in the United States District Court praying that the lease be reformed so as to provide for its termination "six months from the date of the actual cessation of hostilities of the Axis nations then at war or the surrender of said Axis nations." The Government moved for dismissal of the action on the ground that it was barred by the Statute of Limitations. The Circuit Court affirmed the judgment, whereupon Mr. Werner, the plaintiff, then brought the present action in which he alleged that the number of facts that brought the emergency to an end so far as it related to the present lease. The government pleaded *res judicata* as its defense, but on review this court said:

" . . . We hold that this court did no more than affirm the judgment appealed to it. In our opinion we did state that there had been no official termination of the emergency but this statement was a mere recital of the undisputed fact that no official termination of the emergency had been pronounced."

The Court then reversed and remanded the case, stating:

" . . . Appellant is entitled to his day in court . . . " (*Werner v. United States*, 198 Fed. (2d) 882.)

At the time the case was formerly before the court, neither this court's attention nor the court's below was

called to Public Law 239, 80th Cong. 1st Sess., Chapter 327, dated July 25, 1947. Thus the Congress itself by reason of that enactment held that the National Emergency was terminated, by act of Congress. The Government, on the other hand, contended that the Congress had no authority to terminate the national emergency as proclaimed by the President and only the President could so terminate the national emergency, and that the national emergency was not terminated until President Truman's proclamation on April 28, 1952, and therefore the plaintiff is not entitled to judgment.

In this view of the matter, the District Court upheld the government and rendered judgment in favor of the Government.

In this, we respectfully contend, the District Court erred.

SUMMARY OF ARGUMENT

A National Emergency proclaimed by the President is merely a statement of an existing condition which terminates upon the ending of that Condition. The lease in question only required the termination of the unlimited national emergency; it did not require a Proclamation by the President to terminate it. When Congress, by joint resolution, declared the unlimited national emergency ended, it had the same effect as if the President had done so. The Congress of the United States has authority to declare the national emergency ended.

SPECIFICATIONS OF ERRORS

I.

THE DISTRICT COURT ERRED IN HOLDING THAT THE NATIONAL EMERGENCY WAS NOT TERMINATED AS OF JULY 25, 1947, AND THAT THE JOINT RESOLUTION OF CONGRESS OF JULY 25, 1947 DID NOT HAVE THAT EFFECT.

II.

THE DISTRICT COURT ERRED IN HOLDING THAT A NATIONAL EMERGENCY PROCLAIMED BY THE PRESIDENT MAY NOT BE TERMINATED BY A JOINT RESOLUTION OF CONGRESS.

III.

THE DISTRICT COURT ERRED IN NOT ALLOWING THE PLAINTIFF RENT FROM THE DATE OF HIS ACQUISITION OF THE PROPERTY, BASED UPON THE REASONABLE VALUE OF THE LAND, WHICH THE GOVERNMENT CONTINUED TO USE AFTER THE TERMINATION OF THE UNLIMITED NATIONAL EMERGENCY FOR THE GOVERNMENT AIRBASE.

. . .

ARGUMENT

I.

THE DISTRICT COURT ERRED IN HOLDING THAT THE NATIONAL EMERGENCY WAS NOT TERMINATED AS OF JULY 25, 1947, AND THAT THE JOINT RESOLUTION OF CONGRESS OF JULY 25, 1947 DID NOT HAVE THAT EFFECT.

At the outset, we must consider the purpose and need of a proclamation.

A proclamation is defined as follows:

“ ‘Proclamation’ is defined as meaning the act of proclaiming or publishing, any announcement made in a public manner; a publication; a declaration or notice by public outcry; a formal declaration; an avowal. The word is also used to express the public nomination made of any one to a high office.

In law, ‘proclamation’ is defined as meaning an announcement made by a ministerial officer of a court of something to be done; an official notice given to the public; an official public notification by some executive authority of the occurrence of an event important to the public, or of command, caution, or warning in relation to a matter impending; a notice publicly given of anything whereof the executive thinks fit to inform and notify the public; a public notice by an official of some order, an intended action, or some state of facts; a public notice in writing given by a state or city official of some act done by the

government, or to be done by the people; a publication by authority.

Presidential proclamations are discussed generally in the *C. J. S.* title United States § 30, also 65 *C. J.* p. 1271 notes 66-73; and a proclamation of the president of the United States reserving public lands from sale is treated in Public Lands § 74." (72 *C. J. S.* page 1205).

And, in 65 *C. J.* page 1271, § 32b. Proclamations and Orders:

"A proclamation by the president is his official and public announcement of an order. No particular form of such announcement is necessary. The president may issue proclamations when he thinks it is proper to give notice or information to the public, but it has been said that they have no effect as law in the absence of constitutional or congressional authorization."

Having proclaimed a state of national emergency by proclamation, it merely stated a condition and gave notice or information to the public as to an emergency, which became effective on the date of the proclamation. (65 *C. J.* 1271, Sec. 32). The termination of that emergency could be declared by the joint resolution or act of Congress, as it was in this case, on July 25, 1947.

The court below confused the termination of the national emergency with the proclamation to its termination, or its official declaration of termination.

The lease only provided that the occupancy of the premises was to terminate six months after the ter-

mination of the national emergency. The national emergency referred to was that declared by the President in Proclamation 2487. The lease did not provide that it would not expire until the president issued another proclamation. Indeed, the national emergency could have terminated and might have been established even without any proclamation. The proclamation itself was only an official declaration that it had terminated.

Since Congress officially declared it to be terminated by its Joint Resolution of July 25, 1947, and plaintiff's acquisition of the property did not take place until 1948, we were willing to accept without further evidence the official declaration by Congress that the unlimited national emergency had in fact terminated.

The President cannot create an emergency. He may merely proclaim its existence. Without some connection with power granted by the Constitution or Congress, it is without legal significance. To give a proclamation power the lower court attaches to it, would be to give it legislative power and, therefore, it would be unconstitutional. A proclamation is just what the word means.—To proclaim.

In *Muir v. Louisville & N. H. Co.*, 247 Fed. 888, the court said:

“ . . . The President may issue proclamations when he thinks it proper to give notice or information to the public, but it is said they have

no effect in law in the absence of constitutional or congressional authorization.”

Definition of Proclamation in Bouviers Law Dictionary:

“PROCLAMATION. The act of proclaiming or making publicly known certain affairs of state. A written or printed document in which are contained such matters, issued by proper authority, as the President’s proclamation, the Governor’s, the Mayor’s proclamation . . .

The President may give force to law, when authorized by Congress; as, if Congress were to pass an act, which should take effect upon the happening of a contingent event, which was to be declared by the President by proclamation to have happened, in this case the proclamation would give the act the force of law, which till then is wanted. . . .

On the breaking out of war, it is usual for a nation to issue a proclamation announcing the existence of hostilities. See manifesto; War.

“In English law the instrument is thus defined:

“Proclamation (Proclamatio) is a notice publicly given of anything whereof the King thinks fit to advise his subjects.” *Lapayre v. United States*, 84 U. S. 191, 195.

“The proclamation of the President is his official, public announcement of an order. No particular form of such announcement is necessary. It is sufficient if it has such publicity as accomplishes the end to be attained.” *Wood v. Beach*,

156 U. S. 548. Also, see, *Simon v. Moore*, 261 Fed. 638; *Carter v. Territory*, 1 N. M. 317; *Machin v. State*, 62 Md. 244 (They quote Webster's Dist.); *Barrett v. Hitchcock*, 241 Mo. 433.

It will also be disclosed that each and every case upon which the court below relies, wherein the President is authorized to effect certain political acts, was first authorized so to do by congressional act.

The first case cited by the court was the enemy alien act of 1798, construed in *Kurt G. Luecke vs. Walkins*, 335 U. S. 160. The opinion of the court opens by quoting pertinent part of the act as follows:

“*Whenever there is a declared war between the United States and any foreign nation or government,—and the President makes public proclamation of the event—The President is authorized, in any such event, by his proclamation thereof, or other public act, to direct the conduct to be observed, on the part of the United States, toward the aliens who become so liable; . . .*”

The decision, at page 164, further speaks of the power which Congress gave to the President:

“The power with which Congress vested the President had to be executed by him through others.”

The same opinion explains what the court means by a political act. Quoting further from the opinion, at page 168:

“ ‘The State of War’ may be terminated by treaty, or *legislation* or *presidential proclamation*, whatever its mode its ‘termination’ is a political act.”

But it is also true that when the President terminates existing laws or statutes, he must have been first authorized by an act of Congress so to do. An illustration is in the War Brides Act, which is construed in *Knauff v. Shaughnessy*, 338 U. S. 537.

The court below, in attempting to digest the above case, states at page 43 Tr.:

“If we read into the Supreme Court’s statement ‘in respect to the War Brides Act,’ we are interpolating.”

But, if the *Shaughnessy* case was read in its entirety it would have been found, on page 545, that the Supreme Court made the pertinent parts of the act part of its decision:

“She contends that the War Brides Act, applicable portions of which are set out in the margin, (note 8)”

Then the court sets applicable parts which contain Section 5 of the Act which reads as follows:

“5. For the purpose of this act, the second world war shall be deemed to have commenced on December 7, and to have ceased upon the termination of *hostilities* as declared by the President or by *joint resolution of Congress*.”

We also find, on page 545 supra, the following:

“The beginning and the end of the war are defined by the War Brides Act, . . . ”

This means, as stated in Section 5, from December 7, 1941 until the war is terminated by President proclamation or by act of Congress.

It was the contention of the plaintiff in the *Shaughnessy* case that the War Brides Act terminated on the cessation of hostilities, but the court pointed out that the act itself provided that it remained in force until termination by Presidential proclamation or by act of Congress.

In the case at bar, the parties to the lease did not contract to terminate the said lease by Presidential proclamation, so therefore the joint resolution of July 25th, 1947, effectually terminated said lease.

The lease itself provides that in no event shall the lease extend more than 6 months after the termination of the unlimited emergency. Is it possible that Congress, as representing the different agencies of government, cannot determine the end of the unlimited emergency so as to release itself from the obligations of its contract?

The Constitution outlines the duties of Congress, which are found in Article 1, Section 1 to and including Section 18. There will be found ample authority for terminating one of its contracts.

Article 11 outlines the duties of the President and we find them to be rather limited. He is defined as the executive officer of the Government. The President is the executive head of the Government. To attribute to the executive legislative powers would be clearly unconstitutional.

II.

THE DISTRICT COURT ERRED IN HOLDING THAT A NATIONAL EMERGENCY PROCLAIMED BY THE PRESIDENT MAY NOT BE TERMINATED BY A JOINT RESOLUTION OF CONGRESS.

The second problem as poised by the lower court's opinion, and found on page 41 of the record, is as follows:

“2. If Congress may terminate a national emergency, did the joint resolution of July 25, 1947, terminate the national emergency as proclaimed by President Roosevelt?”

The joint resolution specifically mentions both proclamations, including the one in 1941.

The joint resolution also mentions at least one hundred other statutes based on the termination of the unlimited emergency here in question.

Must these different statutes await the general proclamation in 1952, terminating the emergency? No.

The presidential proclamation was a "mop up" and terminated all legislation not terminated by the Congress, and which statute authorized the President so to do. It was also generally informative to the public at large.

The lower court (R. 41) also asks the question, or states that:

"There has been no contention that anyone other than the President may issue a proclamation . . . "

Any governmental head, such as a Mayor, may issue a proclamation. We answer they have no legal significance unless empowered by legislative enactment. He also states that:

"There is no suggestion that the other two branches of government, or either of them—judicial or legislative—may in any way usurp the duties of the President by declaring the existence of a national emergency."

We say the function of declaring an emergency to be in existence has no legal significance unless connected with legislative action. We did not contract to await a presidential proclamation to terminate the lease in question.

The court below confuses the act of informing the public that an emergency exists with the fact of creating an emergency. And last, by the Court (R. 41):

“If the President is the only one who may declare a national emergency, is he alone empowered to terminate it?”

I do not believe that the President, whether it be Roosevelt or Eisenhower, would accept the responsibility of either creating an unlimited emergency or ending it, other than the present responsibility of terminating certain legislative enactments on the happening of a certain event.

The asking of these questions illustrates the complete confusion in the matter, and which will require a clear cut decision by this court before this very simple matter is concluded. The problem can be clearly demonstrated by citing a case which is fundamental and has been cited in all cases bearing on the point. We refer to *Hamilton v. Kentucky Distilleries*, 251 U. S. 153.

This case has to do with the termination of war time prohibition under World War I. The question in that case was whether war time prohibition should cease on the cessation of hostilities or whether it should await the proclamation of the President of the United States. We quote from the decision, page 153:

“That after June 14th, nineteen hundred and nineteen, until the conclusion of the present war and thereafter until the termination of the demobilization, the date which shall be determined and proclaimed by the President of the United States, for the purpose of conserving the manpower of the nation . . . ”

Can it possibly be claimed that the President of the United States could, by proclamation, terminate war time prohibition, without first having been empowered by the Congress so to do?

CONCLUSION

In conclusion, let us say, that the joint resolution of July 25th, 1947, terminated the unlimited emergency here in question in so far as it related to all of the statutes mentioned in Subdivision 3 thereof. These statutes so mentioned did not await the proclamation made five years later, which only effected statutes which in themselves authorized the President to end their effectiveness by proclamation.

This is the third time this matter has been submitted to this Court for action, but this is the first time that the court's attention has been called to the Joint Resolution of July 25, 1947, bringing an end to the emergency as proclaimed by the President May 27, 1941, in so far as it related to the statute under which this lease was entered into.

We, therefore, submit that the decision of the lower court be reversed with instructions to allow compensation to plaintiff for the use of plaintiff's land from the date of his acquisition after the effective date of the joint resolution.

Respectfully submitted,
 MORRIS LAVINE
Attorney for Appellant.

